HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO

Appeal No. 48-08

ORDER DENYING IN PART AND GRANTING IN PART AGENCY'S MOTION TO DISMISS filed 7/14/08.

IN THE MATTER OF THE APPEAL OF:

TIM MULLER,
Appellant,

vs.

DEPARTMENT OF PARKS & RECREATION
and the City and County of Denver, a municipal corporation,
Agency.

The Agency filed its "Motion to Dismiss Appeal for Lack of Jurisdiction" on July 14, 2008. The Appellant responded in opposition on July 22, 2008. The Agency bases its motion upon two grounds: failure to state a claim under the so-called "Whistleblower" rule, and for failure to state a claim for relief which is within the authority of the Hearing Officer. I have considered the filings, the case file, pertinent authority, and now find and order as follows.

1. Legal standard in motion to dismiss.

In an agency motion to dismiss prior to hearing, statements in the appeal must be viewed in the light most favorable to the Appellant, all Appellant's assertions of material facts must be accepted as true, and the motion to dismiss must be denied unless it appears beyond doubt that the appellant cannot prove that the facts as he alleges them would entitle him to relief. Dorman v. Petrol Aspen, Inc., 914 P.2d 909, 911 (Colo. App. 1996),

2. Appellant's Whistleblower claim.

The Whistleblower Protection Ordinance (whistleblower ordinance) prohibits a supervisor from imposing, or threatening to impose, any adverse employment action on an employee in response to the employee's disclosure of information about any official misconduct. [DRMC 2-108 (a)]. For purposes of the motion to dismiss I take as true the following Appellant's allegations. On July 2, 2008, the Appellant submitted a written email complaint of mismanagement to the acting agency manager about mismanagement of water conservation records within the agency. Within minutes, he was placed on investigatory leave and his computer was locked.

The Agency alleges that placing the Appellant on investigatory leave was not an adverse agency action as contemplated by the whistleblower ordinance. The whistleblower ordinance is broadly worded to include not only the adverse agency

actions specified in the ordinance, but any direct or indirect form of discipline or penalty, and also includes the threat of discipline or penalty. [DRMC 2-107 (b)]. The ordinance lists "withholding of work" as an enumerated adverse employment action. *Id.* Viewed in the light most favorable to the Appellant, the Agency's imposition of investigatory leave may constitute the withholding of work, and therefore qualifies as an adverse agency action. The cases cited by the Agency are inapplicable as they define adverse agency action in the context of civil rights claims, rather than in the broader context of the whistleblower ordinance. Also, the timing of the agency's action in placing the Appellant on investigatory leave within minutes of his whistleblower claims, strongly suggest an adverse agency action. For these reasons, the Appellant has stated a claim for relief under CSR 19-10 A. 1. f. Thus, this Agency claim fails.

3. Appellant's requested remedy of reprimand.

The Agency also claims the Hearing Officer has no jurisdiction to order written reprimands. The Agency is correct in stating the Career Service Rules do not grant authority to the Hearing Officer to issue discipline against one employee based upon the request of another. Under the whistleblower ordinance, if a hearing officer determined a supervisor retaliated against a subordinate in violation of the whistleblower ordinance, such supervisor would then be subject to disciplinary action by the supervisor's appointing authority, not by the hearing officer. [DRMC §2-109 (d).

The Appellant responded that he requested other remedies over which I exercise jurisdiction, for example to "return to work" and to "expunge record." [Appellant response p. 4]. A hearing officer is not bound by the remedies suggested by an appellant but must determine if any remedy under the Career Service Rules would provide relief. In re Felix, CSA 82-07 (2/14/08), (*affirmed on other grounds),* In re Felix, CSA 82-07a (6/5/08). These other remedies are within the jurisdiction of the Hearings Office.

For reasons stated above, the Agency's Motion to Dismiss Appeal for Lack of Jurisdiction is GRANTED insofar as to the Appellant's requested remedy of the Hearing Officer assessing discipline *ab initio*, but DENIED as to the Agency's remaining claims. The appeal will proceed to hearing on Appellant's Whistleblower violation claim.

DONE July 24, 2008.

Bruce A. Plotkin
Career Service Hearing Officer